

AP 1771

Docket No.: KCC-14,829



IN THE UNITED STATES PATENT AND TRADEMARK OFFICE
BEFORE THE BOARD OF PATENT APPEALS AND INTERFERENCES

Appellants: Raymond Jeffrey MAY, et al.

Group No. 1771

Serial No.: 09/855,188

Filing Date: 14 May 2001

Examiner: N. Velazquez

Title: TARGETED ELASTIC LAMINATE
HAVING ZONES OF DIFFERENT
POLYMER MATERIALS

Confirmation No. 8199

Customer No. 35844

REQUEST FOR REHEARING UNDER 37 CFR 41.52

Mail Stop Appeal Brief - Patents
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Dear Sir:

Appellants herewith file their Request for Rehearing in the above-identified case, in response to the Board's Decision on Appeal mailed 30 June 2006. Appellants respectfully submit that the Board's Decision is contrary to prevailing legal principles. Thus, for the reasons set forth below, Appellants once again respectfully request that this Board reverse the rejections of Claims 1-17, 19-21, and 50-59 under 35 U.S.C. §103(a).

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KCC-1088

In the Board's Decision, the Board applied an overly broad interpretation to the terms "first elastomeric polymer" and "second elastomeric polymer," contrary to prevailing legal principles.

1. THE CLAIMS MUST BE READ IN VIEW OF THE SPECIFICATION.

The Board has opined that the term "first elastomeric polymer" in ordinary usage is not distinguished in composition from the "second elastomeric polymer" but merely lists the order of the polymers, i.e., the scope of the claim includes the first and second elastomeric polymers being identical. The Board further states that they find no express disclaimer of this broad definition in Appellants' specification, but merely a preference for differences in composition of the first and second elastomeric polymers.

In *Phillips v. AWH Corp.*, 415 F.3d 1303 (Fed. Cir. 2005), the court cites a number of cases ruling that claims must be read in view of the specification. While it is true, as pointed out by the Board, that the Office should not import limitations from the specification into the claims, but should only limit the claim based on an express disclaimer of a broader definition, *the subject patent application expressly discloses that the first and second elastomeric polymers are not identical*, thus disclaiming the broader definition of the two polymers being identical.

First of all, the title of this patent application is "Targeted Elastic Laminate Having Zones of Different Polymer Materials," which clearly indicates that the claimed invention includes *different* polymer materials.

Secondly, the specification clearly describes a laminate including at least two different polymers. For instance, at page 12, lines 15-17, the specification states: "First filaments 12 and second filaments 16 are made from different polymers or polymer blends, (i.e., have different compositions)." The polymers may include the same or different base polymers (as recited in dependent Claims 3 and 4), but in either case the resulting polymers of which the filaments are formed are *different*. As succinctly summarized at page 3, lines 15-20:

The high tension zone of the material can have filaments made of a polymer or polymer blend with a higher elastic tension than the filaments in the low tension zone. A polymer blend in the high tension zone may include some of the same base polymer as a polymer blend in the low tension zone, but with a different percentage of a second component. Alternatively, polymer blends of the high and low tension zones may include different elastic base polymers.

“Ultimately, the interpretation to be given a term can only be determined and confirmed with a full understanding of what the inventors actually invented and intended to envelop with the claim.” *Phillips*, 415 F.3d at 1317, citing *Renishaw PLC v. Marposs Societa' per Azioni*, 158 F.3d 1243, 1250 (Fed. Cir. 1998). “Importantly, the person of ordinary skill in the art is deemed to read the claim term not only in the context of the particular claim in which the disputed term appears, but in the context of the entire patent, including the specification.” *Phillips*, 415 F.3d at 1313.

It is clear upon reading the entire subject patent application, including the title and the specification, that the Appellants intended to envelop *two different polymers* in Claim 1. By failing to recognize any distinctions between the “first elastomeric polymer” and the “second elastomeric polymer” in Claim 1, the Board has failed to follow the guidelines set forth in *Phillips*.

2. EACH ELEMENT CONTAINED IN A PATENT CLAIM IS DEEMED MATERIAL TO DEFINING THE SCOPE OF THE PATENTED INVENTION.

By construing the terms “first elastomeric polymer” and “second elastomeric polymer” as including the first and second elastomeric polymers being identical, the Board has ignored another prevailing legal principle. As stated in *Warner-Jenkinson Co. v. Hilton Davis Chemical Co.*, 520 U.S. 17, 29 (1997), “Each element contained in a patent claim is deemed material to defining the scope of the patented invention.” By giving no weight to the difference between the terms “first elastomeric polymer” and “second elastomeric polymer,” the Board is essentially ignoring the materiality of these terms. This interpretation of terms in Claim 1 is contrary to the teachings in *Warner-Jenkinson*.

3. APPELLANTS MAINTAIN THEIR ARGUMENTS SET FORTH IN THE APPEAL BRIEF AND IN THE REPLY BRIEF.

A. There is no suggestion or motivation to combine the teachings of *Melbye et al.*, *Cederblad et al.*, and *Beitz et al.*

Despite the fact that *Melbye et al.*, *Cederblad et al.*, and *Beitz et al.* all involve elastomeric filaments, Appellants maintain that there is no suggestion or motivation to dissect the concept of using strands of *different compositions* from the elastomeric netting of *Cederblad et al.* and the concept of a barrier layer from the gusset-flap member of *Beitz et al.*, and to insert these concepts into the elastic sheet-like composites of *Melbye et al.*

None of the cited references suggest that *different elastomeric compositions* can be used to create different “zones” of elasticity akin to using different quantities of strands or thicker and thinner strands. *Cederblad et al.* include strands having different elastomeric compositions, but the overall material in *Cederblad et al.* has uniform elastic properties with no “zones” of differing tension.

Appellants appreciate the Examiner’s attempt to extract merely the concept of strands having different elastomeric compositions from *Cederblad et al.* and to insert the strands into the *Melbye et al.* composites. However, only through the use of impermissible hindsight would a person skilled in the art even consider using the strands of *Cederblad et al.* in an application in which (a) the strands do not intersect and (b) the strands are bonded to facing materials. There is absolutely no suggestion or motivation to apply the strands of *Cederblad et al.* in such manner, particularly since (a) *Cederblad et al.* is directed to a material having *uniform tension* across the MD as well as *uniform tension* across the TD attributable to the intersecting grid-type configuration of the strands, and (b) *Cederblad et al.* distinguishes the elastomeric netting from materials bonded to facing materials, thereby *TEACHING AWAY from bonding the elastomeric strands to facing materials.*

Appellants’ arguments based on the type of extruder *Melbye et al.* use to produce the elastic strands is pertinent because the *Melbye et al.* invention includes the method of making the material therein, and one of the attributes of the invention of *Melbye et al.* is that the method affords “versatility in selecting characteristics of the

elastic sheet-like composites to be produced without major modifications of the equipment.” (Page 2, lines 3-8). Thus, ***it would be contrary to the intended purpose of Melbye et al. to form an elastic sheet-like composite having at least two different types of strands made from at least two different types of materials*** because separate extruders and/or dies would be required to apply the different materials, and the addition of more extruders and/or dies would be a major modification of the equipment. Despite Appellants’ claims being product claims, the fact remains that the product and process in *Melbye et al.* are interrelated. More particularly, ***there is no suggestion or motivation to modify the product of Melbye et al. if, by doing so, the modifications required to form the product would be repugnant to the intended purpose of the process.*** Thus, there is no suggestion or motivation to modify *Melbye et al.* in the manner suggested by the Examiner.

Contrary to the Examiner’s assertion, there appears to be no suggestion or motivation to provide a liquid impermeable barrier layer in the *Melbye et al.* composite based on the gusset-flap member in *Beitz et al.* More particularly, the gusset-flap members in *Beitz et al.* are not formed as a sheet-like composite, but instead are formed as separate components specifically configured for application to a garment. The leg gussets may include a barrier layer with a first arrangement of elastomeric members positioned between the barrier layer and the fabric layer within a leg gusset section of the gusset-flap member, and a second arrangement of elastomeric members attached to at least the fabric layer within a containment flap section of the gusset-flap member. However, ***there is no suggestion in Beitz et al. to form the gusset-flap member as a sheet-like composite***, thus there is no suggestion or motivation to extract the barrier layer from the gusset-flap member and insert the barrier layer into the sheet-like composite of *Melbye et al.*

Appellants maintain that there is no suggestion or motivation to dissect the concept of using strands of different compositions from the elastomeric netting of *Cederblad et al.* and the concept of a barrier layer from the gusset-flap member of *Beitz et al.*, and to insert these concepts into the elastic sheet-like composites of *Melbye et al.*

B. *Melbye et al.*, *Cederblad et al.*, and *Beitz et al.*, when combined, fail to teach or suggest all of Appellants' claim limitations.

Yet another factor in establishing a prima facie case of obviousness is that the prior art references, when combined, must teach or suggest all the claim limitations. Neither *Melbye et al.* nor *Cederblad et al.* nor *Beitz et al.*, alone or in combination, disclose or suggest a targeted elastic laminate material having different zones of tension, with **filaments in one zone having a different composition than filaments in a second zone**. Furthermore, neither *Melbye et al.* nor *Cederblad et al.* nor *Beitz et al.*, alone or in combination, disclose or suggest a targeted elastic laminate material having filaments of different compositions bonded to a facing material, wherein the **different types of filaments run in the same longitudinal direction**. Although *Cederblad et al.* disclose elastic strands of different compositions, there are no “zones” of different tension or “zones” of different compositions. As explained above, in *Cederblad et al.* the strand composition is constant in the machine direction as well as in the transverse direction, such that all of the MD tension is uniform and all of the TD tension is uniform. Even if *Melbye et al.* were combined with *Cederblad et al.* and *Beitz et al.*, the combination would still fail to achieve the targeted elastic laminate material of the present invention because neither *Melbye et al.* nor *Cederblad et al.* nor *Beitz et al.*, nor any combination thereof, discloses or suggests the combination of strands of different elastic polymers applied in the same longitudinal direction between two facing materials to provide zones of varying tension, along with a barrier layer positioned between at least a portion of each of the facing materials.

C. *Mleziva et al.* fail to overcome the deficiencies of *Melbye et al.*, *Cederblad et al.*, and *Beitz et al.*

As explained above, there is no suggestion or motivation to combine *Melbye et al.*, *Cederblad et al.*, and *Beitz et al.*, to achieve a combination of strands of ***different elastic polymers*** applied in the same longitudinal direction between two facing materials to provide zones of varying tension, along with a barrier layer positioned between at least a portion of each of the facing materials.

Melbye et al., *Cederblad et al.*, and *Beitz et al.* further fail to disclose any elastic tension relation between the low tension zone and the high tension zone,

they do not disclose employing an elastomeric adhesive to bond the facing layer and the filaments, and they do not disclose using a spunbond material or a meltblown continuous filament composite web for the facing material.

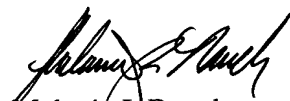
The Examiner suggests that it would have been obvious to one of ordinary skill in the art to use the extrusion processes disclosed in *Mleziva et al.* to create the facing materials recited in Appellants' Claims 16 and 17. The Examiner also suggests that it would have been obvious to one of ordinary skill in the art to use an elastomeric adhesive to bond the low and high tension zones to the facing material because *Mleziva et al.* disclose adhesive bonding of fibers to facing layers as an alternative method to autogeneously bonding the layers and strands.

However, as pointed out above, *Melbye et al.* emphasize a process that involves no major modifications of the equipment. Since the composites in *Melbye et al.* are formed by extruding strands of molten thermoplastic material onto the sheet of material to form elastic strands thermally bonded to the sheet of material, major modifications would be required to instead adhesively bond elastic strands to a sheet of material. Additionally, *Cederblad et al.* teach away from the whole concept of bonding a facing material to elastic strands. For these reasons, and the other reasons presented above, the combined teachings of *Melbye et al.*, *Cederblad et al.*, *Beitz et al.*, and *Mleziva et al.* fail to disclose or suggest the targeted elastic laminate material of Claims 16, 17, and 19 of the present invention.

CONCLUSION

For the reasons presented above, Appellants respectfully submit that the Board's Decision is contrary to prevailing legal principles and, further, that when properly construing the terms "first elastomeric polymer" and "second elastomeric polymer" in Claim 1, the Examiner's Answer does not overcome Appellants' arguments on appeal. Therefore, Appellants respectfully request that the Board reconsider this case and reverse the rejections proposed by the Patent Office.

Respectfully submitted,



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